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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1947.

No. 395

STIMSON MILL COMPANY, a corporation,
Petitioner.

VS.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI.

To the United States Circuit Court of Appeals For the Ninth Circuit.

BERT L. KLOOSTER,
Attorney for Petitioner.

CHAPMAN AND CUTLER,
Of Counsel.

Scheffer Printing Company, Del. 7171

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CERTIFICATE PURSUANT TO RULE 33.

The undersigned, Bert L. Klooster, attorney for Petitioner, hereby certifies that the petition for rehearing filed in this cause is presented in good faith, that in his judgment said petition is restricted to the grounds specified in part 2 of Rule 33 as amended, and that said petition for rehearing is not interposed for delay.

Bert L. Klooster,
Attorney for Petitioner.

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To the Honorable Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The petition for rehearing of Stimson Mill Company (hereinafter called Stimson) respectfully shows the following grounds not previously presented for allowance of the Writ of Certiorari:

I. Many taxpayers are being deprived of an opportunity to seek a conflicting decision in another Circuit

Court of Appeals, by reason of E.P.C. 16 which provides that relief may be denied without a detailed determination of normal earnings for separate years in cases where the Commissioner determines that his method of computing the constructive average would not result in a greater amount than the average under section 713 before reconstructing earnings under section 722.

II. It appears that respondent by recognizing or refusing to recognize the bar of section 732(c) to some extent seeks to control the jurisdiction of the courts.[1]

III. A procedural issue (as to whether the tax was paid before a claim for refund was filed) suggested in the Brief in Opposition, may have caused the Court to infer that if reviewed in this Court this case might be decided on that immaterial issue rather than on the issue presented in the petition, whereas such immaterial procedural issue is not properly before this Court.[1]

IV. The Committee Reports on the Revenue Bill of 1942 contain a specific explanation of the operation of section 722(b) (1) and show the method of granting relief in the case of a strike such as Stimson experienced, and it is submitted that the method of computation for which Stimson contends is in full accord with this explanation.

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[1] The Brief in Opposition was served on counsel for Stimson on Armistice Day, November 11, 1947, and the Court denied the Petition on November 17, 1947. In addition to constituting substantial grounds not previously presented as specified by Part 2 of the new Rule 33, as revised by this Court, points II and III, which in part arise by reason of the Brief in Opposition, might also be considered as being based on facts which are in the nature of circumstances of substantial effect intervening since the Petition herein was filed.

In the remainder of this petition for rehearing the above points are amplified.

I.

E.P.C. 16 issued by the Excess Profits Tax Council, which acts for the Commissioner in the administration of the relief provisions of section 722, provides in part as follows:

> "But a taxpayer which has established the existence of one or more of the factors set forth in section 722(b) (1), (2), (3), (4), or (5) *may be denied relief without a detailed and exact determination of normal earnings* when it is clear that without such a determination normal earnings would not exceed average base period net income." (Emphasis supplied).[2]

By assuming the power to include the computation of the constructive average as part of his discretionary determination of normal earnings, the Commissioner extends the statutory authority given him beyond the determination of normal earnings. His use of the expression "normal earnings" in the above quotation is with the meaning of "constructive average base period net income." When the Commissioner decides that the determination of normal earnings for separate years of the base period, averaged together as an ordinary arithmetic average, will probably result in an amount that is less

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[2] E.P.C. 16 is reported in the Internal Revenue Bulletin, C. B. 1947-1, p. 90. E.P.C. 16, dated June 2, 1947, was published in the Commerce Clearing House Reporter under date of June 11, 1947, the day after this case was argued in the Court of Appeals (R. p. 61) and was quoted, apparently with approval, by that Court in its opinion (R. p. 79, footnote 8).

than the average pursuant to the 75% rule of section 713 computed before correcting abnormalities under section 722, he now authorizes himself to refuse to compute normal earnings for separate years. It appears that the Commissioner is thus indicating that, in the case of another taxpayer deprived entirely of relief solely by the Commissioner's method of computing the constructive average, he never again will make the "mistake" of exercising his discretion to determine normal earnings for separate years as he did by stipulation in this case with respect to Stimson's earnings for 1937, and unless the Commissioner is forced by legal process to exercise his discretion and determine normal earnings for separate years in the case of another taxpayer, that is denied relief as in this case, it seems unlikely that the question as to the correct computation of the average for separate years could be brought before another Circuit Court of Appeals by such a taxpayer.

Furthermore, many taxpayers are represented before the Treasury Department only by a certified public accountant or an economist because of the technicalities involved in the determination of normal earnings for separate years. Even in the case at bar Stimson was represented by a certified public accountant in the Tax Court while the Commissioner was represented by four lawyers (Rec. p. 21). Such technical representatives of taxpayers cannot ordinarily be expected to be as thoroughly cognizant of the legal rights of their clients as lawyers, and may regard the denial of certiorari in this case as an authoritative approval by this Court of the Commissioner's computation of the constructive average. It seems probable that the cases of many taxpayers will be closed and

their rights foreclosed during the next two or three years before a taxpayer that is allowed relief on the basis of an ordinary arithmetic average may secure a conflicting decision in another Circuit Court of Appeals and a review by this Court.

The denial of relief to many taxpayers solely by reason of the Commissioner's computation of the average as in this case, seems particularly unjust in view of the fact that Congress in the statutory provisions here effective intended to remove limitations in the prior law so that relief might be given even in "cases involving relatively small tax savings."[3]

It is respectfully submitted that this case presents the issues involved in their simplest form. Since reconstructed earnings for 1937 have been stipulated there remains for determination here only the question of the proper computation of the constructive average. It is also respectfully submitted that an authoritative determination by this Court at an early date will preserve the rights of many taxpayers that are now threatened with a deprivation of their rights by E.P.C. 16.

II.

It is respectfully urged that point 2 of the Commissioner's argument in opposition presents the important question whether the Commissioner may to some extent

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[3] Quoted from Report of Finance Committee noted in footnote 5, C. B. 1942-2 p. 654, respecting amendment to Revenue Bill of 1942. The House receded with respect to this amendment, — Conference Report, H. R. Report No. 2586, Seventy-seventh Congress, Second Session, October 12, 1942, C. B. 1942-2 p. 701 at pp. 720, 721.

control the jurisdiction of the courts, by permitting review as in the *Pohatcong* case (infra), or by raising a bar to review as in this case whenever he chooses to seek the shelter of section 732(c) and hide his own lack of jurisdiction.

The question of the jurisdiction of this Court (which necessarily includes the jurisdiction of the Court of Appeals) is the first question presented by the Petition (Pet. p. 8). In stating that the Court of Appeals "was without jurisdiction under section 732(c)" (Br. in Opp. p. 6) the Commissioner is also denying the jurisdiction of the Supreme Court of the United States.

The Commissioner cites *Pohatcong Hosiery Mills, Inc.* v. *Commissioner*, C.C.A. 3, 1947, 162 F. (2d) 146 (Br. in Opp. p. 7), in which it appears that the Commissioner did not raise the question whether jurisdiction was barred by section 732(c) although the Court reviewed a procedural question involving subsection (d) of section 722. The Court said (at page 148):

> "As is immediately apparent, we are not here concerned with the merits of petitioner's claim for relief under section 722; we are concerned with the procedure for the realization of such relief."

It is submitted that the question whether section 732(c) precluded a review of a procedural question involving section 722(d) should at least have been presented and decided before the court in that case decided the procedural question. As shown in point III, infra, it also appears that the procedural issue suggested by the Brief in Opposition should properly be barred by section 732(c).

It is respectfully submitted that the extent to which

section 732(c) bars the jurisdiction of the courts should be authoritatively determined, and that the authoritative determination of the jurisdiction of the courts, as well as the authoritative determination of the limits of the Commissioner's discretionary jurisdiction, will not only aid the proper administration of the tax laws, but will also establish a needed precedent in the development of administrative law for the guidance of other administrative officers.

III.

It is respectfully submitted that the procedural issue suggested at pages 2 and 7 of the Brief in Opposition, as to whether the tax was paid before the claim for refund was filed, is not properly before this Court, and will not prevent a decision of this Court on the questions stated in the Petition (Pet. pp. 8-11) if the case is reviewed by this Court.

Procedural questions relating to the sufficiency of the application for relief as a claim for refund were not raised by the Commissioner in the Tax Court. His action on the merits of the claim for refund was a waiver of any irregularities therein (*Tucker* v. *Alexander,* 1927, 275 U.S. 228, 231, 72 L. ed. 253, 256) including any payment made after filing the claim for refund (*Continental Illinois National Bank* v. *United States,* Court of Claims 1941, 39 F. Supp. 620, 623) and was presumptive proof of all acts necessary to make that action legally operative (*R. H. Stearns Co.* v. *United States* 1934, 291 U.S. 54, 63; 78 L. ed. 647, 653). Stimson's claim for refund was not rejected because it was filed before the tax was paid as was the

case in *Pohatcong Hosiery Mills, Inc.* v. *Commissioner*, C.C.A. 3, 1947, 162 F. (2d) 146, 147. The Commissioner sent Stimson a notice of disallowance of the claim (Rec. p. 7) and thus determined that the claim had met the requirements of section 722(d). In the Tax Court the Commissioner failed to raise any objection and did not deny that his determination was correct.

The Commissioner stipulated that the tax was overpaid if the average is computed as petitioner claims it should be, and the Tax Court adopted the stipulation as a finding of fact (Rec. p. 27). It was a finding that the petitioner would recover something—that the claim met the requirements of section 722(d). It is submitted that such determination was a determination of a question of fact necessary solely by reason of section 722, of which section 722(d) is a part, and that *review of such a fact determination under section 722 by the Courts (other than the Tax Court) is precluded by section 732(c)*. It was not a question of whether the Commissioner had exceeded the statutory bounds of his discretionary jurisdiction, as Stimson submits is the question herein relating to the computation of the constructive average.

The record shows that the amount of the deficiency, $2,106.08, was paid after the application for relief was filed. *Some tax had been paid before the application was filed,* and that was a sufficient basis for relief (*Uni-Term Stevedoring Co.* v. *Commissioner,* 3 T.C. 917, 919). From the record the amount of overpayment can be computed as $5,759.70 subject to adjustment for the 10% post-war credit (Pet. pp. 5, 6); and from any standpoint an overpayment of excess profits tax results even if the amount of the deficiency be excluded from the computation.

In accordance with the stipulation (Rec. p. 27) as well as in accordance with the rules of the Tax Court, it appears that the amount of a refund would be computed after a remand of the case to the Tax Court if this Court should find the issue as to the proper computation of the average in Stimson's favor. It is submitted that if a writ of certiorari should be granted herein the procedural issue suggested by the Commissioner would not prevent a decision of this Court on the jurisdiction issue or the issue as to the computation of the average.

IV.

At pages 8 and 9 of the Brief in Opposition it is said that "There is nothing in the legislative history which justifies" the conclusion argued by Stimson that the constructive average is required to be computed in the manner provided by section 713. It is respectfully submitted that the report of the Committee on Ways and Means contains the following specific explanation of the operation of section 722(b) (1) in the case of a strike such as Stimson experienced:[4]

> "If in one or more taxable years in the base period the normal production, or output, or operation was interrupted or diminished because there occurred immediately prior to or during the base period events unusual and peculiar to the experience of the taxpayer, it may obtain this relief. An example of such an occurrence would be a fire, a flood, or a strike. If as a re-

[4] Committee on Ways and Means Report No. 2333, Seventy-seventh Congress, First Session, accompanying the Revenue Bill of 1942, as reported in Internal Revenue Bulletin — Cumulative Bulletin, 1942-2, p. 391.

sult of a fire in 1938 the earnings in 1939 were abnormally low, *there might be substituted for 1939* an amount approximating what the volume of business would have been if the fire had not occurred. This relief is similar to the relief granted under section 722 of the present law." (Emphasis supplied).

Also with regard to the operation of the statute in the same situation the report of the Committee on Finance[3] stated:

> "This is an expression of the same situation for which relief is granted under existing law, . . ."

The "present law" and the "existing law" are the 1941 enactment of section 722 which admittedly required the constructive average to be computed in the manner prescribed by section 713. Before relief is granted under the 1942 enactment the average must be computed under section 713. The only difference between that average and the constructive average indicated by the above quotation is the *substitution* there stated. Normal earnings established for one year of the base period are "substituted" for the excess profits net income for that year (as explained at the top of page 19 of the argument in support of the petition).

A "hybrid credit" results when relief is granted under section 722, either pursuant to the Commissioner's method of computing the constructive average and then taking 95% thereof under section 713, or pursuant to the statu-

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[3] Senate Report No. 1631, Seventy-seventh Congress, Second Session, accompanying the Revenue Bill of 1942 as reported in Internal Revenue Bulletin — Cumulative Bulletin, 1942-2, pp. 649-650.

tory method for which Stimson contends. The issue here, which involves questions as to the limits of jurisdiction and discretion, is which hybrid credit is proper.

Wherefore petitioner prays this Court to reconsider its petition and, if this Court now deems it proper so to do, to vacate the judgment denying such petition and to issue a Writ of Certiorari to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit in the instant case entered July 21, 1947.

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APPENDIX.

Sections 722(d) and 732(c)
of the
Internal Revenue Code as Amended

Sec. 722(d)[6] *Application for Relief Under This Section.* The taxpayer shall compute its tax, file its return, and pay the tax shown on its return under this subchapter without the application of this section, except as provided in section 710(a) (5). The benefits of this section shall not be allowed unless the taxpayer within the period of time prescribed by section 322 and subject to the limitation as to amount of credit or refund prescribed in such section makes application therefor in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. If a constructive average base period net income has been determined under the provisions of this section for any taxable year, the Commissioner may, by regulations approved by the Secretary, prescribe the extent to which the limitations prescribed by this subsection may be waived for the purpose of determining the tax under this subchapter for a subsequent taxable year.

* * * * *

Sec. 732(c) (26 U.S.C.A. Sec. 732(c)) *Finality of determination.* If in the determination of the tax liability under this subchapter the determination of any question is necessary solely by reason of section 711(b) (1) (H), (I), (J), or (K), section 721, or section 722, the determination of such question shall not be reviewed or redetermined by any court or agency except the Board.

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[6] Sec. 722(d) was amended to its present language by Act of December 17, 1943, C. 346, 57 Stat. 601 — 26 U.S.C.A. Internal Revenue Acts beginning 1940 p. 417. That Act makes this amendment applicable with respect to taxable years beginning after December 31, 1939.